Supreme Court, U. S.
FILED
JUL 5 1977
MICHAEL RODAK, JR., CLERK

No. 76-1504

In the Supreme Court of the United States

OCTOBER TERM, 1977

DONALD R. McGEE, PETITIONER

v.

RAILROAD RETIREMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The court of appeals rendered no opinion (see 549 F. 2d 807). The opinion of the Railroad Retirement Board (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 1977. A petition for rehearing was denied on February 2, 1977. The petition for a writ of certiorari was filed on April 29, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board's determination that petitioner is not entitled to a disability annuity under the Railroad Retirement Act of 1937 is supported by substantial evidence.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 2(a) of the Railroad Retirement Act of 1937, 50 Stat. 309, as amended, 45 U.S.C. 228b(a), provides, in pertinent part:

> The following-described individuals, if they shall have been employees on or after the enactment date, and shall have completed ten years of service, shall * * * be eligible for annuities after they shall have ceased to render compensated service to any person, whether or not an employer as defined in section 1(a) (but with the right to engage in other employment to the extent not prohibited by subsection (d)):
>
> * * * * *
>
> 5. Individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment.

20 C.F.R. 208.17(a) provides:

> An individual shall be deemed to be permanently disabled for work in any regular employment if he has a permanent physical or mental condition, as that term is defined in §208.10, and he is because of such condition unable to perform regularly, in the usual and customary manner, the substantial and material duties of any regular and gainful employment which is substantial and not trifling, with any employer, whether or not subject to the act.

20 C.F.R. 208.10(a) provides in pertinent part:

> [T]he term "permanent physical or mental condition" means a physical or mental impairment that can be expected to result in death or has lasted, or can be expected to last for a continuous period of not less than 12 months.

STATEMENT

Petitioner filed an application for a disability annuity on September 18, 1972. The application stated that petitioner was born on October 31, 1929, and worked in the railroad industry from July 14, 1953, to November 4, 1971, for Burlington Northern, Inc., where he was last employed as a conductor-brakeman. Petitioner claims he became disabled for work in his regular railroad job and for any other kind of regular work on November 4, 1971, because of a fractured knee, a depressed back fracture, and other injuries (Pet. App. B, p. 1).

On October 29, 1975, on the basis of an extensive medical record, the Railroad Retirement Board determined that petitioner was not entitled to a disability annuity under Section 2(a)5 of the Railroad Retirement Act of 1937 (45 U.S.C. 228b(a)5) because his permanent physical or mental condition had not been shown to be such that he was unable to engage in any regular employment within the meaning of that section (Pet. App. B). The court of appeals affirmed, holding that the decision of the Board was supported by substantial evidence (Pet. App. A).

ARGUMENT

Petitioner contends (Pet. 7-11) that the Board's finding of nonentitlement is incorrect and that the court of appeals failed to review the record to determine whether the Board's finding is supported by substantial evidence. These contentions concern the application of settled rules of law[1]

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[1]Section 8 of the Railroad Retirement Act of 1974, 88 Stat. 1343 (45 U.S.C. (Supp. V) 231g), pursuant to which this action was brought, incorporates the judicial review provisions of the Railroad Unemployment Insurance Act, 52 Stat. 1100, as amended (45 U.S.C. 355(f)),

to a particular set of facts and do not warrant further review by this Court. Moreover, the court of appeals' decision is correct.

As the Board's decision indicates (Pet. App. B), the Board considered numerous medical reports submitted in this case. This evidence shows that although there is some damage to petitioner's left knee, the damage is not of itself, or in combination with other factors, of sufficient severity to be considered as disabling from all regular employment. Petitioner's impairments prevent him from engaging in strenuous, physical activities. But as the Board found (Pet. App. B, p. 13), that does not mean that petitioner is "unable to engage in any regular employment" within the meaning of Section 2(a)5 of the Act.

The record contains the opinion of a vocational consultant, Dr. Helen Wilson, that petitioner is able to engage in substantial gainful employment. Based upon a review of the other evidence in the case, Dr. Wilson concluded (Pet. App. B, pp. 12-13) that given his physical condition, interests and qualifications, petitioner "has potential for many occupations and vocations," and is capable of performing a number of light sedentary jobs (see Pet. App.

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which in turn provides that "[t]he findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive." The law is well settled that a decision of the Railroad Retirement Board regarding entitlement to disability benefits under the Railroad Retirement Act is not to be set aside on judicial review if it is not based on an error of law. *E.g., Jenkins* v. *Railroad Retirement Board*, 458 F. 2d 1359 (C.A. 5); *Copeland* v. *Railroad Retirement Board*, 327 F. 2d 348, 350 (C.A. 5); *Aldridge* v. *Railroad Retirement Board*, 285 F. 2d 759, 760 (C.A. 5); *Bertamini* v. *Railroad Retirement Board*, 440 F. 2d 278, 280 (C.A.D.C.).

B, p. 16).[2] This opinion, as well as the other medical opinions discussed in the Board's decision (Pet. App. B, pp. 1-11), amply support the findings that petitioner's impairments are not such that he is unable to engage in any regular employment and thus that he is not disabled under the Act.[3] See *Kyle* v. *Cohen*, 449 F. 2d 489 (C.A. 4); *Gotshaw* v. *Ribicoff*, 307 F. 2d 840 (C.A. 4); *Harvey* v. *Richardson*, 451 F. 2d 589 (C.A. 9); cf. *Colange* v. *Railroad Retirement Board*, 410 F. 2d 11, 12 (C.A. 9); *Lowe* v. *Railroad Retirement Board*, 294 F. 2d 115, 116 (C.A. 9); *Marr* v. *Railroad Retirement Board*, 206 F. 2d 47 (C.A. 4); *Harris* v. *Richardson*, 450 F. 2d 1099, 1102 (C.A. 4); *Grant* v. *Richardson*, 445 F. 2d 656 (C.A. 5).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] Dr. Wilson's report further states (Pet. App. B, p. 13): "the fact that a person with the abilities and interests that this man has demonstrated should declare himself as completely disabled and useless for the rest of his life seems incredible."

[3] There is no basis for petitioner's contention that the court of appeals did not consider the record. The court is not required to give a detailed explanation of its decision, and its disposition of the case by a *per curiam* affirmance does not show that it did not properly consider the case.